HABEAS CORPUS RESOURCE CENTER
50 Fremont Street, Suite 1800
San Francisco, CA 94105
Tel 415-348-3800 ♉ Fax 415-348-3873

November 9, 2004

Frederick K. Ohrlich
Clerk of Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *In re Anderson Hawthorne on Habeas Corpus*, Supreme Court No. S116670

Dear Mr. Ohrlich:

I. APPLICATION, IDENTIFICATION, AND INTEREST OF AMICI CURIAE

Pursuant to this Court's order of October 29, 2004, and Rule 29.1(f) of the California Rules of Court, the Habeas Corpus Resource Center (HCRC), the Office of the State Public Defender (OSPD), and the California Appellate Project (CAP) apply to appear as Amici Curiae in the above-captioned matter. All three entities are involved in the representation in this Court of the men and women under sentences of death in California. By virtue of their responsibility to represent condemned prisoners or assist private counsel in such representation, the HCRC, OSPD, and CAP have an

interest in the important questions presented by Mr. Hawthorne's case. Amici respectfully request that the Court file this letter and consider the arguments set forth below in adjudicating the merits of Mr. Hawthorne's petition for writ of habeas corpus.

II. LETTER BRIEF IN SUPPORT OF PETITIONER

The HCRC, OSPD, and CAP offer two arguments in support of petitioner. First, this Court should apply California's well-established definition of mental retardation, contained in Penal Code section 1376(a), to this case and should reject respondent's attempt to establish an immutable Intelligence Quotient ("I.Q.") score ceiling. In this particular case, without justification or explanation, respondent seeks a ceiling score of 69. Second, under established rules for pleading claims on habeas corpus, petitioner has presented a prima facie claim under *Atkins v. Virginia* (2002) 536 U.S. 304, and, therefore, he is entitled to either a ruling that his death sentence must be commuted to a sentence of life in prison without the possibility of parole or an evidentiary hearing on the claim. In light of Mr. Hawthorne's factual allegations and respondent's insufficient rejoinder, the question of Mr. Hawthorne's mental retardation cannot be resolved against him without a hearing, although it may be resolved in his favor on the allegations and documents before the Court.

1. The settled definition of mental retardation in California, which is contained in Penal Code section 1376(a), should be applied to this case.

Petitioner requests this Court to apply the California Legislature's definition of mental retardation as provided in Penal Code section 1376(a), California's statute implementing *Atkins* at the trial level. (Traverse at 2-9.) Despite the Legislature's express rejection of a specified I.Q. score, respondent asserts that to prove mental retardation for an *Atkins* claim, a petitioner must have an I.Q. score of 69 or below and that petitioner here has failed to offer such proof. (Return at 2.) This Court should reject respondent's position, which is inconsistent not only with section 1376(a), but with long-standing California law.

For two decades, both Penal Code section 1001.20(a), which governs diversion of mentally retarded defendants, and Welfare and Institutions Code section 6500, which governs involuntary commitment of mentally retarded people and was interpreted in *In re Krall* (1984) 151 Cal.App.3d 792, have used definitions of mental retardation that are nearly identical to Penal Code section 1376(a). The Legislature enacted Penal Code section 1376(a) against the backdrop of these statutes and the decisional law interpreting them. (See *Bailey v. Superior Court* (1977) 19 Cal.3d 970, 977-978, fn 10 [Legislature is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted].)

All three statutes essentially define mental retardation as the condition of (1) significantly subaverage general intellectual functioning, (2) existing concurrently with deficits in adaptive behavior, (3) and manifested before the age of 18. These definitions reflect the basic definition of mental retardation endorsed by the leading professional organization on the condition, the American Association of Mental Retardation (see *Mental Retardation: Definition, Classification and Systems*

of Supports (hereafter "Mental Retardation") (10th Ed. 2002) at pp. 8-9, 20, 73-76) and the American Psychiatric Association (see *Diagnostic and Statistical Manual of Psychiatric Disorders* (4th Ed. Text Revision, 2000) at pp. 41, 48). (See *Atkins, supra,* 536 U.S. at pp. 309-310, n. 3.)

These legislative, judicial, and professional definitions do not contain the rigid I.Q. cut-off respondent suggests precisely because respondent's assertion is contrary to scientific, medical, and legal reasoning. Mental retardation is a developmental disability that must be clinically diagnosed on the basis of a wide array of information about an individual's intellectual functioning and real-world behavior. (See *Mental Retardation, supra,* at pp. 57-59, 73-78, 93-96; *Kaplan & Sadock, Comprehensive Textbook of Psychiatry* (7th Ed. 2000) at pp. 2600-2602, 2604-2605.) Standardized intelligence tests may inform a diagnosis, but they cannot, by themselves, prove or disprove mental retardation. Thus, high courts in at least two other states already have determined it to be inappropriate to adjudicate the merits of *Atkins* claims by fashioning inflexible I.Q. limits. (See *People v. Pulliam* (Ill. 2002) 794 N.E. 2d 214, 218, 257-260 [Illinois Supreme Court ordered a post-conviction hearing where defendant's full scale I.Q. scores ranged from 69 to 77 and experts disagreed on whether she was mentally retarded]; *People v. Johnson* (Mo. 2003) 102 S.W.3d 535, 538, 540-541 [Missouri Supreme Court remanded for a hearing where defendant had full scale I.Q. scores of 63, 70-75, 77, and 84].)

Respondent has failed to justify the abrupt departure it urges from California's scientifically established and legally settled definition of mental retardation. It also has failed to address the illogic, and probable unconstitutionality, of applying one definition of mental retardation to defendants presenting *Atkins* claims at trial and a different definition to petitioners presenting *Atkins* claims in post-conviction. (See *City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 439 ["all persons similarly situated should be treated alike"].) The HCRC, OSPD, and CAP urge this Court to reject respondent's contention that an I.Q. score above 69 automatically defeats an *Atkins* claim, and to apply California's settled definition of mental retardation, which is contained in Penal Code section 1376(a), to *Atkins* claims presented on habeas corpus.

2. Petitioner is entitled to relief under *Atkins* or an evidentiary hearing on his *Atkins c*laim.

This Court issues an order to show cause upon a petition for writ of habeas corpus if the factual allegations, taken as true, establish a prima facie case for relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 475.) "Issuance of an OSC, therefore, indicates the issuing court's preliminary assessment that the petitioner would be entitled to relief if his factual allegations are proved." (*Id*.) The return must "state facts and respond to the factual allegations set forth in the petition." (*Id*. at 478, fn. 4.) A return that contains only general denials is deficient because it "fails to fulfill its function of narrowing the facts and issues to those that are truly in dispute," and it "prevents a habeas corpus petitioner from controverting those facts in his or her traverse." (*Id*. at 480.) "Thus, it is through the return and the traverse that the issues are joined in a habeas corpus proceeding." (*People v. Romero* (1994) 8 Cal.4th 728, 739.)

Once the issues are joined, the court must determine whether an evidentiary hearing is needed. If the return admits allegations in the petition for writ of habeas corpus or fails to affirmatively state material facts that contradict the factual allegations in the petition, the Court may grant relief without an evidentiary hearing. (*Romero*, *supra*, 8 Cal.4th at 739 & 744; *In re Sixto* (1989) 48 Cal.3d 1247, 1252 [writ granted without hearing where return did not dispute the material factual allegations, because court could resolve issue on materials before it].) "Conversely, consideration of the written return and matters of record may persuade the court that the contentions advanced in the petition lack merit, in which event the court may deny the petition without an evidentiary hearing. Finally, if the return and traverse reveal that petitioner's entitlement to relief hinges on the resolution of factual disputes, then the court should order an evidentiary hearing." (*Romero*, *supra*, 8 Cal.4th at 739 (citations omitted); Pen. Code, § 1484.)

Mr. Hawthorne's traverse alleges in detail the factual bases for his claim that he is mentally retarded, and thus that the Eighth and Fourteenth Amendments to the United States Constitution prohibit his execution as cruel and unusual punishment. The factual allegations that establish a prima facie case of his mental retardation include a declaration from a qualified mental health professional, Dale Watson, Ph.D., who opined that petitioner is mentally retarded, as well as ample documentary and anecdotal evidence of his subaverage intellectual functioning and his deficient adaptive functioning by the age of 18.[1]

Respondent's return is deficient because it merely denies generally that petitioner is mentally retarded. Respondent asserts that Mr. Hawthorne's I.Q. scores at various points in his life have ranged above the claimed "prerequisite" I.Q. score of 69 arbitrarily selected by respondent (Return at 2 & 9-10); that the validity of his I.Q. scores is questionable because respondent has not conducted an examination of petitioner or the records of the testing (Return at 4-5 & 11-12); and that

---

[1] **Although petitioner here has submitted a declaration by an appropriate mental health professional stating that petitioner is mentally retarded, such expert evidence should not be required to state a prima facie case for relief under *Atkins* in post-conviction proceedings. A petitioner prosecuting a petition for writ of habeas corpus and represented by private appointed counsel has access to substantially less funds than a defendant awaiting a capital trial, who has access to Penal Code section 987.9 monies. (See Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 3, Standard 2-2.1) As a result of this funding discrepancy, a habeas petitioner will be prohibited frequently as a practical matter from presenting a mental health professional's declaration about a petitioner's mental retardation, as required at trial by section 1376. (*Duvall*, *supra* 9 Cal.4th at 474, emphasis added [the petition should include copies of *reasonably available* documentary evidence supporting the claim]). Indeed, the Legislature limited the amount of investigation and expert reimbursement to $25,000 prior to the issuance of an order to show cause in post-conviction proceedings before the United States Supreme Court issued its decision in *Atkins*. Thus, any requirement that a habeas petitioner submit an expert declaration will require this Court or the Legislature to supplement the funds accorded to habeas petitioners in capital proceedings. Therefore, this Court should find a prima facie case is made when petitioner's allegation of mental retardation is based on the sorts of documentary evidence typically relied upon by a qualified expert, such as intelligence test scores, school records and anecdotal evidence of deficits in adaptive functioning manifested by the age of 18.**

Mr. Hawthorne "has revealed no significant adaptive deficits" other than an "arguable deficit in education." (Return at 3-4 & 11.) Respondent simply asserts without support (and in a rather confused and inconsistent manner, given its adherence to the number "69" elsewhere in the Return) that the "significantly subaverage general intellectual functioning" requirement of Penal Code section 1376 demands an I.Q. score of 60 or less (Return at 9-10), and merely re-characterizes the allegations showing deficits in adaptive behavior manifested before the age of 18. (Return at 3-4.) Moreover, respondent fails to provide any competent expert opinion or analysis to challenge the diagnosis of mental retardation, explain the medical or scientific validity of the two ceilings it suggests, or present anecdotal evidence through lay witnesses to challenge petitioner's evidence of deficiencies in adaptive functioning. Respondent's assertions can fairly be viewed as general denials because they do not set forth "*the factual basi*s" on which respondent reaches its conclusion that petitioner is not mentally retarded. (*Duvall*, *supra*, 9 Cal.4th at 481-482.) Accordingly, because respondent has not stated facts sufficiently contradicting the allegations in the petition, this Court may grant the petition for writ of habeas corpus without an evidentiary hearing. (See *Romero*, *supra*, 8 Cal.4th at 739 & 744.)

In this particular case, the fact that petitioner's counsel denied respondent's counsel and its unidentified experts unrestricted access to petitioner and his medical records does not excuse respondent from setting forth the factual basis for its assertion that petitioner is not mentally retarded, as required by *Duvall*. Although a court may excuse a respondent from alleging contradictory facts if "the critical information is possessed by petitioner and is not reasonably available to respondent," and hold an evidentiary hearing to determine the truth or falsity of allegations in the petition (*Duvall*, *supra*, 9 Cal.4th at 486), this exception does not apply where the factual lacuna is of respondent's own making. The reason why respondent has not been afforded the opportunity to test Mr. Hawthorne is that respondent's counsel refused to specify the experts it intended to use and the tests it intended to administer. Petitioner is entitled to this information under *Centeno v. Superior Court* (2004) 117 Cal.App.4th 30, 45. Because respondent chose to withhold that information, it should not be allowed to allege that petitioner's counsel barred access to petitioner and his records and use that purported refusal to defeat Mr. Hawthorne's entitlement to relief on the record before this Court. In addition, nothing prevented respondent's counsel from attempting to gather anecdotal evidence of adaptive functioning through lay witness interviews.

If, however, this Court finds that respondent's failure to allege contradictory facts is excused because critical information is not reasonably available to respondent, an evidentiary hearing to determine the truth or falsity of petitioner's factual allegations regarding his mental retardation should be held. (*Duvall*, *supra*, 9 Cal.4th at 486.) Moreover, an evidentiary hearing is warranted if this Court finds that respondent's return sufficiently states facts that contradict allegations in the petition establishing a prima facie case for relief, thus placing petitioner's mental retardation in dispute. (*Id*. at 478.)

Mr. Hawthorne satisfied his burden of pleading with requisite particularity facts, which, if proved, are sufficient to establish grounds for relief. He has alleged with particularity that he suffers from mental retardation – a factual allegation based on commonly accepted clinical definitions consistent

with Penal Code section 1376(a), Penal Code section 1001.20(a), the American Association on Mental Retardation and the American Psychiatric Association, which respondent disputes but has not specifically rebutted. Upon the facts as alleged in the petition, return and traverse, this Court cannot deny the petition without ordering a hearing.

III. CONCLUSION

For all the foregoing reasons, this Court should reject respondent's assertion that a prima facie showing of mental retardation requires establishment of a ceiling intelligence test score and instead should adopt the settled definition of mental retardation in California as contained in Penal Code section 1376(a). This Court also should either grant petitioner's claim for relief under *Atkins* or order an evidentiary hearing on the claim.

Respectfully Submitted,

MICHAEL LAURENCE, State Bar #121854
Executive Director
HABEAS CORPUS RESOURCE CENTER

By: _____

MICHAEL J. HERSEK, State Bar #142065
State Public Defender
OFFICE OF THE STATE PUBLIC DEFENDER

By: _____

PATRICIA A. KERN, State Bar #190354
Deputy Director
CALIFORNIA APPELLATE PROJECT

By: _____